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STATUTES

U.S.C. 28 1361

U.S.C. 42 1981, 1983, 1985, 1986, 3301, 3303

Constitutional Provisions

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Federal Rules of Civil Procedure, Rule 56 (c)

A corporation, especially a membership corporation, may be deemed a "citizen" for various purposes. Oneida County Forest Preserve Council v. Wehle 128 N.E. 2d 282

Petitioner, Covington Housing Development Corporation is a corporation, and therefore, it is said, it cannot claim for itself the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But it has business and property for which it claims protection. The Corporation is threatened with destruction through the unwarranted compulsion which respondents have exercised . . . . and this Court has gone very far to protect against loss threatened by such action. . . . Petitioners ask protection against arbitrary, unreasonable, and unlawful interference. . . . Pierce v Society of Sisters of Holy Names 268 U.S. 1070. Terrace v Thompson 263 U.S. 197.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. _____

COVINGTON HOUSING DEVELOPMENT CORP., ET. AL. PETITIONERS

VS.

CITY OF COVINGTON, ET. AL. RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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* * *

Now comes petitioner, Eddie Thompson, Jr., on behalf of the Covington Housing Development Corporation and Eddie Thompson, Jr., and pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on April 23, 1975; petition for rehearing denied on June 5, 1975.

Citations to Opinions Below

I. The opinion of Judge Mac Swinford granting the City's motion to dismiss was granted because plaintiffs did not submit a brief opposing the motion. The reason plaintiffs did not submit a brief is that the City's attorney, Mr. Wagner, and defendant and attorney, Mr. Condit, prevented plaintiffs' attorney, Mr. Clifford Fennell, from submitting a brief; a fact the City's attorney acknowledges in his affidavit to the Sixth Circuit Court of Appeals.

Upon appeal, the Sixth Circuit Court ruled that no appeal was taken. Sixth circuit did not rule on the City's motion to strike from plaintiff-appellants brief any and all reference to the December 18, 1973, order of the District Court dismissing the City of Covington as a party defendant. The opinion of the Sixth Circuit appears on page 27.

II. The opinion of Judge Mac Swinford granting summary judgment to defendants was not supported by any facts or law. IN fact, his recital of Elk Valley Coal Co. v Thompson 150 Ky 614, 150 S.W. 817, supports plaintiff-appellants. In this instance, the Sixth Circuit Court of Appeals has considered none of the facts presented by petitioner and has refused to undertake an independent review of the record as required by federal Rules of Civil Procedure. Rule 56 (c)

III. The opinion of Judge Mac Swinford dismissing claim by Thompson is equally not supported by fact or law. The Honorable Judge Mac Swinford had not reached the conclusion (that Thompson had not stated a case) when he erroneously dismissed the City of Covington at the cost of plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr. The reviewing court did not take an independent review of the record.

IV. Last, but not least, is the fact that an order dismissing Carlton and Wooten was before the Court of Appeals, and the Reviewing Court made no mention of an appeal from that order. Mr. Kinnaird, in his affidavit, had already admitted that Roger Carlton may have taken the action alleged in the complaint and that he no longer worked for the Department of Housing and Urban Development.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 23, 1975. Petition for rehearing was denied on June 5, 1975. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1) and any other applicable section.

STATUTES INVOLVED

The Federal Statutes involved are 42 U.S.C. 1981, 1983, etc. (Act of April 20, 1971) and Civil Rights Act of 1875; 42 U.S.C. 3301, 3303, etc. (Demonstration Cities and Metropolitan Act of 1966)

QUESTIONS PRESENTED

I. (a) Did plaintiffs appeal from order dismissing the City of Covington?

(b) Under federal programs or projects initiated under 42 U.S.C. 3301, etc., is the City a desired party?

(c) Could defendants prevail, where they illegally pressured plaintiffs' counsel into not answering motion?

(d) Can City illegally terminate a model Cities project in order to deny a black person, or anyone, employment in said project?

II. (a) What proof was there in the original record that Thomson was not authorized to file this suit on behalf of the Corporation?

(b) In a case where defendants had sued plaintiff earlier in his representative capacity, could defendants later claim that agent did not have the power to sue in his representative capacity?

(c) Was Broadus Blythe a managing agent?

(d) The District Court made reference to depositions and interrogatives of other participants in the operation. Were they board members? Who were they?

(e) In what instances were there "internal corporate dissensions" regarding the propriety of this suit?

(f) Were Thompson and others injured by the illegal phasing out of this Model Cities Project, in that the City is still withholding Thompson's salary and that of his staff members?

(g) Would Corporation benefit by this suit?

(h) Did Sixth Circuit Court seek to render judgment which is just, legal, and proper?

III. (a) Did Thompson state the same cause of action as the Covington Housing Development Corporation?

(b) Was Thompson injured by the illegal phasing out of the project?

(c) In a Model Cities project which is illegally phased out for racial reasons, would Thompson, as agent (employee), be entitled to back wages?

(d) Can City of Covington and City Officials, for racial reasons, force me into involuntary bankruptcy by illegally with holding funds that I had already earned by contract?

(e) Can defendants use fraud, or any means available, to deprive Thompson of his constitutional rights?

(f) What did defendants plead regarding Thompson?

IV. (a) Were Roger Carlton and Hobart Wooten Desired parties?

(b) Did plaintiffs seek administrative remedies?

(c) Could Roger Carlton and Hobart Wooten cause a Model Cities project to be illegally phased out because the City Manager was opposed to a black person as director of said project?

STATEMENT

This is a suit by a Kentucky Corporation and Eddie Thompson, Jr., severally and jointly. This suit was commenced under 42 U.S.C. 1981, 1983, against the City of Covington, Kentucky, several City Officials, and two HUD Representatives for their arbitrary and capricious actions in phasing out the Covington Housing Development Corporation for racial reasons.

Plaintiffs broadened their pleadings to include 42 U.S.C. 3301, 3303, etc.

The City of Covington, defendants Grimm, Saegeser, Simpson, Bowman, Wermelling, Royster, Hedrick, Wolfe, Condit, and Woods moved to dismiss, citing, Monroe vPape 365 U.S. 167.

Mr. Wagner and Mr. Condit prevented plaintiffs' attorney, Mr. Clifford Fennell, from answering motions.

City Officials gave frivilous and unmeritorious answers and asked to take depositions of plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr.

Mr. Wagner and Mr. Condit prevented plaintiffs' attorney from attending the depositions, and Mr. Fennell instructed Thompson to go ahead, assuring Thompson that he would be present.

Mr. Wagner and Mr. Condit knew that Mr. Fennell would not appear, and they tricked Broadus Blythe into giving his deposition. They knew that Mr. Blythe was not a managing agent and could not speak for the Corporation.

Defendants then came in with an affirmative defense that the Covington Housing Development Corporation had not authorized the filing of this suit and should be dismissed; which was not true, and which they did not prove.

Mr. Blythe was not authorized to speak for the Corporation.

Judge Mac Swinford granted defendants Summary Judgment. He did not take into consideration any of the argument presented by plaintiffs.

Even if the Corporation had not, or did not ratify this suit, the managing agent, Eddie Thompson, Jr., would have been able to maintain this suit in the name of the Corporation. Elk Valley Coal Co. v Thompson 150 S.W. 817.

For what cause Summary Judgment was granted, or how the Sixth Circuit Court of Appeals could concur, is unknown; but the reasons are inconsistent with Kentucky State Laws or Federal Laws.

This decision leaves many important issues unclear. It makes a mockery of our State and Federal Constitutions.

On what bases the lower courts concluded that if this complaint was profferred by Thompson, it had no merit, give one an unequivocal feeling that some men do not respect our Constitutions.

Judge Mac Swinford's decision to grant motion to dismiss Carlton and Wooten was so ridiculous that the Sixth Circuit Court was reluctant to even address that issue, even though it was argued before them.

While Wooten and Carlton are respondents, based on the appeals, we feel that the U.S. Attorneys office supports our position.

REASON FOR GRANTING WRIT

The lower court's decision was so far departed from the accepted and usual course of judicial proceedings. The Sixth Circuit Court's sanctioning of such departure calls for an exercise of this Court's power of supervision.

The plaintiffs' constitutional rights were violated. The phasing out of a Model Cities project, without citizen participation, to prevent a black from having a job in the project is illegal. North City Area-Wide Council, Inc. v Romney 469 F 2d 1326 (1972); Rodriquez v Barcelo 358 F Supp 43 (1973)

If a complaint charges a state officer not only with deliberately misinterpreting a statute against a plaintiff, but also with purposely singling him out alone for that misinterpretation, it is good against demurer. Burt v City of New York 156 F 2d 791, 792 Bottom

A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Scher v Board of Education of West Orange 424 F 741, 744

Where there has been no formal ratification by the Board of Directors of a corporation at a regular meeting of an unauthorized act of an agent; the question of whether individual acquiescence of failure to disaffirm amounts to ratification depends on the facts of the case, and where the unauthorized act is beneficial to the corporation, and the directors have individual knowledge of it, slight evidence shows ratification, but where the corporation does not derive any benefits from the unauthorized act, or it is doubtful if it has received benefit and no third party person has suffered loss, evidence of ratification by individual acquiescense or failure to repudiate must be clearly shown. Elk Valley Coal Co. v Thompson 150 S.W. 817.

Even if the City was dismissed, 42 U.S.C. 1983 gives a remedy-action at law, suit in equity or other proper proceedings for redress to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position whether they act in accordance with their authority or misuse it. Monroe v Pape 365 U.S. 167.

Under 42 U.S.C. 3301, 3303, the City would be a desired party.

The approval by the court below of the trial court's decision makes a travesty of the plain meaning of 42 U.S.C. 1981, 1983; 42 U.S.C. 3301, 3303; 28 U.S.C. 1361.

CONCLUSION

This court should grant the petition for Certiorari and hear the issues raised in these important areas of Civil Rights and Federally funded programs.

Respectfully submitted,

Eddie Thompson Jr.

EDDIE THOMPSON, JR., Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

No. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET. AL. PLAINTIFFS

V.

CITY OF COVINGTON, ET. AL. DEFENDANTS

ORDER

The defendants are given until Monday, December 10, 1973 at 4:00 P.M., to file answers or otherwise plead in this action.

November 15,1973 Mac Swinford Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

NO. 1752
COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL PLAINTIFFS

v.

CITY OF COVINGTON, ET AL DEFENDANTS

MEMORANDUM AND ORDER

This civil rights action commenced under 42 U.S.C. 1983 against the City of Covington and numerous municipal officials alleges racial discrimination in the operation of the local Housing Development Corporation.

The City has moved to dismiss on the ground that the Civil Rights Act does not contemplate actions against municipalities. The plaintiffs have been afforded an opportunity for submission of briefs and the record is before the court for decision.

It is well-settled that a municipality is not a "person" within the purview of the Civil Rights Act. In Monroe v. Pape, 365 U.S. 167 (1961),

> "the Court held that 42 U.S.C. 1983. . . was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities. At the same time, however, the Court held that a municipality is not a 'person' within the meaning of 1983." Moor v. County of Alameda, 411 U.S. 693, 699-700 (1973).

Accord, City of Kenosha v. Bruno, 412 U.S.507 (1973); Patrum v. City of Greensburg, Kentucky, 6th Cir., 419 F. 2d 1300 (1969), cert; denied 397 U.S. 990 (1970); Deane Hill Country Club, Inc. v. City of Knoxville, 6th Cir., 379 F. 2d 321 (1967), cert. denied 389 U.S. 975 (1967).

It is ordered that the motion to dismiss filed by the City of Covington be and the same hereby is sustained and the the complaint, insofar as it applies to the City of Covington, be and the same hereby is dismissed at the cost of the plaintiffs.

December 18, 1973 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

The motion of the Unites States for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure requesting that the defendants, HUD representative Roger Carlton and HUD Representative Hobart Wooten, not be required to answer interrogatories served upon the United States Attorney pending disposition of the motion of the United States to dismiss the action as to these defendants is sustained.

These two named defendant need not answer interrogatories until a ruling of the court is had on the pending motion to dismiss the complaint as to each of them. In the event the motion to dismiss the complaint is overruled, they will be given the thirty days from the date of the order-over-ruling the motion to file answers to the interrogatories.

May 13, 1974 — /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO.1752

COVIGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

This case is set down for hearing on all pending motions on Tuesday, July 16, 1974, at 1:00 P.M.

June 27, 1974 — /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO.1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

It is ordered and adjudged herein as follows:

1) The motion of the United States to dismiss as to defendants Carlton and Wooten is sustained;

2) The complaint, insofar as it applies to Roger Carlton and Hobart Wooten, is dismissed at the cost of the plaintiffs.

See Memorandum.

June 27, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION,ET AL PLAINTIFFS

v.

CITY OF COVINGTON, ET AL DEFENDANTS

MEMORANDUM

The complaint in this civil rights action alleges that on October 5, 1972, the plaintiff contracted with the City of Covington for the development of a housing complex pursuant to the Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301, et seq. Because the Executive Director of the housing authority was a Negro, however, city officials deliberately misrepresented certain facts to the Department of Housing and Urban Development (hereinafter: HUD) in a successful attempt to block further funding of the project. The publicity surrounding the curtailment and the defendants' false allegations of an overspent budget defamed the character of the Housing Development Corporation Director, Eddie Thompson, Jr.

The plaintiff seeks damages and/or an injunction directing the revival of the project.

On December 18, 1973, the complaint was dismissed as to the City of Covington on the ground that a municipality is not a "person" within the contemplation of the Civil Rights Act, 42 U.S.C. 1981, et seq. City of Kenosha v. Bruno, 412 U.S. 507 (1973). The record is now before the court on the motion by the United States to dismiss HUD employees Roger Carlton and Hobart Wooten for lack of jurisdiction. The plaintiff has responded that jurisdiction is empowered as to these defendants under 28 U.S.C. 1361 and 5 U.S.C. 701, et seq.

A preliminary appraisal of the complaint indicates that Carlton and Wooten are not proper parties defendant. Wooten is deceased while Carlton is no longer a departmental employee. Further, although the complaint demands substantial damages in lieu of renewed funding, the plaintiff has name as defendants only the area HUD representatives. These individuals clearly lack "the ability and authority . . . to effectuate the relief which the (plaintiff) seeks." Ceballos v. Shaughnessy, 352 U.S. 599, 603 (1957); see also Williams v. Fenning, 332 U.S. 490 (1947); Boles v. greeneville Housing Authority, 6th Cir., 468 F. 2d 476 (1972); 7 Wright and Miller, Federal Practice and Procedure, Section 1622; contra Rodriguez v. Barcelo, D. P.R., 358 F. Supp. 43, 48-49 (1973).

Even if accorded an opportunity to remedy this deficiency, the allegations of the complaint reveal this action as one against the United States and thus barred by the doctrine of sovereign immunity.

It is well settled that the United States, its agencies, and officers are not suable in the absence of its consent. Kawananakoa v. Polyblank, 205 U.S. 349 (1907). The identity of the defendant is ascertained not from the style of the complaint but by the manner in which the judgment would be framed. Simons v. Vinson, 968 (1968). Where, as here, the relief sought would require affirmative government action or deplete public funds, the action is one against the United States.

> "The general rule is that a suit is against a sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land V. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act. Larson v. Domestic & Foreign Corp. . . . 337 U.S. 682, 704 (1949). Dugan v. Rank, 372 U.S. 609, 620 (1963).

See also Hawaii v. Gordon, 373 U.S. 57 (1963); Sierra Club v. Hickel, 6th Cir., 467 F. 2d 1048, 1051 (1972), cert. denied 411 U.S. 920 (1973); Arthur v. Fry, E.D. Tenn., 300 F. Supp. 622 (1969). An exception to this rule prevails where it is alleged that "the federal official acted beyond his statutory authority or. . . in an unconstitutional manner of under a statute which is constitutionally void." Rothgeb v. Statts, S.D. Ohio, 56 F.R.D. 559, 561 (1972); Malone v. Bowdoin, 369 U.S. 643, 647 (1972). Unlike the arbitrary and capricious action attacked in other actions commenced under the Demonstration Cities and Metropolitan Development Act, North City Area-Wide Council, Inc. v Romney, 3d Cir., 428 F. 2d 754, 758 (1970); Coalition

for United Community Action v. Romney, N.D. Ill., 316 F. Supp. 742 (1970), the complaint in the case at bar bears no suggestion of an excessive or unconstitutional exercise of authority. Even if it be determined that federal officials acted erroneously, the relief demanded patently requires "affirmative action on the part of the sovereign or the expenditure of funds from the public treasury." Rothgeb v. Statts, supra; Benson v. City of Minneapolis, D. Minn., 286 F. Supp. 614, 619-620 (1968).

While the above conclusion is alone sufficient for dismissal, it should additionally be noted that the plaintiff has failed to pursue administrative remedies. The exhaustion requirement is a judicial construct intended to "allow an administrative agency to perform functions within its special competence–to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185 (1969). Although not literally incorporated into either statute, it is well settled that the doctrine is an inherent part of both the Administrative Procedure Act, Holland Furnace Company v. Percell, W.D. Mich., 125 F. Supp. 74, 80 (1954), and 28 U.S.C. 1361, Beale v. Blount, 5th Cir., 461 F. 2d 1133, 1137 (1973); Richardson v. United States, 3d Cir., 465 F. 2d 844, 849 (1972), cert. denied 410 U.S. 955 (1973).

The only suggestion of an attempted administrative exhaustion is the revelation in the memorandum opposing dismissal of a letter of complaint in March, 1973, and other unspecified contacts with the Louisville, Kentucky, HUD office. Although hopeless administrative attempts for redress are

unnecessary, Ogletree v. McNamara, 6th Cir., 449 F. 2d 93 99 (1971); Nemitz v. Norfolk and Western Railway Co., N.D. Ohio, 287 F. Supp. 221, 230 (1968), the plaintiff in the case at bar has alleged neither such futility nor an attempted compliance with the department's "administrative remedies validly established by regulation. . . . "National Lawyers Guild v. Brownell, D.C. Cir., 255 F. 2d 552, 557 (1955), cert. denied 351 U. S. 927 (1956); 24 C.F.R. Parts I and II.

An order will be entered sustaining the motion filed by the United States to dismiss defendants Carlton and Wooten.

June 27, 1974 /s/ Mac Swinford, Judge
(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL PLAINTIFFS

VS:

CITY OF COVINGTON, ET AL DEFENDANTS

ORDER

On July 16, 1974, came the plaintiffs by Clifford R. Fennell, their attorney and the defendants by Charles Wagner and Joseph Condit, their attorneys.

The Court heard counsel and being advised reserved its ruling on all pending motions.

The plaintiffs were given until July 26, 1974 to amend their pleadings.

The case is continued until further orders.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

It is ordered and adjudged herein as follows:

1) That the motion for summary judgment filed by defendants Grimm, Sageser, Bowman, Wermeling, Simpson, Royster, Hedrick, and Wolfe, be and the same hereby is sustained;

2) That the complaint be and the same hereby is dismissed at the cost of the plaintiff, Eddie Thompson, Jr.

See Memorandum.

September 11, 1974 — /s/ Mac Swinford, Judge

(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

v.

CITY OF COVINGTON, ET AL — DEFENDANTS

MEMORANDUM

The complaint in this civil rights action commenced by the Covington Housing Development Corporation and its executive director alleges that on October 5, 1972, the corporation contracted with the City of Covington for the development of residential areas under the Demonstration Cities and Metropolitan Development Act, 42 U.S.C. 3301, et seq. Because the executive director of the Authority was a Negro, city officials deliberately misrepresented certain facts to the department of Housing and Urban Development in a successful attempt to halt further funding to the project. The corporation alternately seeks damages or reinstatement of the development, while Thompson demands renumeration for the defendants' racist hiring practices and defamatory allegations of fiscal irresponsibility.

Orders entered on December 18, 1973, and June 27, 1974, directed the dismissal of the complaint as to the City of Covington and certain federal officials. The record is now before the court on the defendants' motion for summary judgment on the ground that Thompson lacks the capacity to sue in the name of the Covington Housing Development Corporation. It is contrarily asserted that the plaintiff's power

to initiate this action is derived from his managerial position as reflected in governing statutes and corporate records; that several directors informally agreed to the commencement of this action; and that the corporation has ratified Thompson's action. An examination of the cited standards compels dismissal of the complaint.

The plaintiff's assertion of an inherent authority to institute this action in the name of the entity reveals a fallacious interpretation of both the corporate records and the legal principles outlining the extent of a manager's authority. Kentucky law vests control over corporate affairs in a board of directors, "except as may be otherwise provided in the articles of incorporation." K.R.S. 271A.175.1 The board may in turn delegate a portion of its decisionmaking authority to responsible corporate officers:

> "All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws." K.R.S. 271A. 250 (2).

1 Although incorporated under K.R.S. Chapter 273, the provisions of Chapter 271A are applicable to "any corporation of that kind either are inconsistent with this chapter or state that the provisions of this chapter do not apply to it." K.R.S. 271A.015(1).

Article III. The responsibilities of the executive director are thus enunciated in the corporation's bylaws:

> "The Executive Director shall be the Chief Executive Officer of the corporation. He hall have custody of the Corporation funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation. He shall deposit all monies and other valuable effects in the name, and to the credit of the corporation in such depositories as may from time to time be designated by the Board of Directors. He shall have all of the general powers and juties which are usually vested in the office of Chief Executive Officer of the Corporation." Article V, Section 4.

While the executive director is not expressly denied the authority to institute legal proceedings, the court is cited to no articles, bylaw or resolution vesting such responsibility in the plaintiff.

> "Authority to bind the corporation must come either from the by-laws or the board of directors, or the action of the officer must be of the nature that co-es within the apparent scope of his employment. . . . The mere representations of a claimed agent, even when coupled with signing a paper in such capacity, are not sufficient to show his agency or the extent therof." Har-Bel Coal Company v. Asher Coal Mining Company, supra at 130.

Muir v. Glassbrenner Motors Company, 211 Ky. 1, 4 (1925); Caddy Oil Co. v. Sommer, 186 Ky. 843, 847 (1920). The depositions and interrogatories of other participants in the operation reveal that the executive director was at no time vested with the authority to commence litigation; indeed, the corporate minutes strongly suggest that Thompson was not even a company official at the time this action was initiated.

While a managing director enjoys a broad range of commercial responsibility, the court is unaware of any decision construing in such inherent control the right to commence litigation of this magnitude. Rather, it is well settled that a manager's authority is limited to the conduct of ordinary business affairs:

> "(T)he general business of corporations is frequently entrusted to the management of a general manager. . ., who has the power to bind the corporation by acts within the scope of his apparent authority. Such authority is not limited by the fact that the general manager is also the president or other officer of the the corporation, for it is not incident to such other office, but is incident to the management of the business. . . . He has been deemed by numerous authorities to be the principal officer of the corporation, having general charge of those business matters for the carrying on of which the company was incorporated, and he has the implied or ostensible power to do any act which is usual or necessary in the ordinary transaction of the company's business." 19 Am.Jur. 2d "Corporations" Section 1174, p. 599.

See also Gaddie v. Collins of Kentucky, Ky., 248 S.W. 2d 722, 723 (1952). The powers implied in such a governing director typically include: consummating contracts incidental to corporate operations; procurement of equipment; employing and supervising employees in such a governing director typically include: consummating contracts incidental to corporate operations; procurement of equipment; employing and supervising employees in the course of business; selling goods; receiving payment of accounts; and directing the ordinary affairs of the business. Restatement, Second, Agency, Section 73. The frequently added authority to commence necessary litigation, see Custer Channel Wing Corporation v. Frazer, S.D. N.Y.,

181 F. Supp. 197 (1959); Annot.,10 A.L.R. 2d 701; contra Fanchon & Marco, Inc. v. Paramount pictures, S. D. N.Y., 107 F. Supp. 532, 538 (1952), is subject to the same limitations attending the manager's other functions: "the authority. . . is normally restricted to litigation incidental to the regular course of the corporation's business." Note, 50 Ky. L.J. 92 (1961): see Ky. Penn. Oil & Gas Corp. v. Clark, 247 Ky. 438, 450-451 (1933); Rasnick v. W.M. Ritter Lumber Co., 187 Ky. 523 (1920). Even this circumscribed power is negated in the event of inernal corporate dissension regarding the propriety of suit. See Contee Construction Co. v. Cay Construction Co., Fla., 221 So. 2d 792 (1969); Note, 50 Ky. L.J. 92 (1961). Thompson's Litigation relates not to ordinary business affairs but is an extraordinary attempt to revive an enterprise which the board of directors ordered terminated on March 16, 1973.

The conclusion that the plaintiff acquired no inherent power to initiate this action is buttressed by Kentucky decisions narrowly defining the functions exercisable by a single officer. Thus, the court in Caddy Oil Co. v. Sommer, 186 Ky. at 847, ruled that a president's general administrative authority did not embrace the right to contract for the sale of corporate property; "(t)his . . .authority is . . .limited and governed by the character of business, in which the corporation is engaged." Banco Ky. Co's Rec'r v. Nat'l Bk. of Ky.'s Rec'r, 281 Ky. 784 (1939); Empire Coal Mining Co. v. Empire Coal Co., 183 Ky. 699 (1919); see also Burley Tobacco Co. v. Vest, 165 Ky. 762 (1915).

Similarly, The expansive power "to transact all kinds of business". does not authorize a general manager to sell corporate property or bind the company to a contract unconnected with the business of the enterprise. Elk Valley Coal Company v. Thompson, 150 Ky. 614 (1912).

The plaintiff's reliance upon an informally granted authority to commence this litigation ignores the "well settled doctrine that a corporation can act only through its directors at an official meeting regularly held, and that its acts can be proven only by the records of such meeting." Bastin v. Givens, Admx., 170 Ky. 201, 205 (1916); Clay v. Mt. Holly Development Company, Ky., 464 S.W. 2d 621, 624 (1971); Star Mills v. Bailey, 140 Ky.194 (1910). See also Paducah Newspapers, Inc. V. Goodman, 251 Ky. 754 (1933); Kozy Theatre Company v. Love, 191 Ky. 595, 601-602 (1921); a business will not be bound by agreements secured among isolated directors. Caddy Oil Company v. Sommer, 186 Ky. at 847; see 19 Am.Jur. 2d "Corporations", Section 1157. The claimed ratification of Thompson's decision to sue is similarly unsupported by any suggestion of express or implicit approval of the plaintiff's action; see Tarrants v. Henderson County Farm Bureau, Ky., 380 S.W. 2d 274, 277 (1964); Catlettsburg & Buchannan Telephone Co. v. Bond, 262 Ky. 106, 108 (1936); Harlan, Etc., Co. v. Eastern Construction Co., 254 Ky. 135, 145 (1934); Paducah Newspapers, Inc. v. Goodman, 251 Ky. at 758-759.

A finding that the corporate plaintiff is not properly a party to this action compels a secondary determination whether the action should be dismissed or retained for resolution of the claims proffered by the individual plaintiff. It is initially apparent that Thompson has no personal remedy for injuries suffered by the Covington Housing Development Corporation.

See Mullins v. First National Exchange Bank of Virginaia, W. D. Va., 275 F. Supp. 712, 721 (1967). Further, the deprivations allegedly inflicted upon the plaintiff individually are insufficient to justify retention of jurisdiction: the slanderous utterances on the part of the defendants do not evoke a cause of action under the Civil Rights Act, 42 U.S.C. 1981, et seq; Azar v. Conley, 6th Cir., 456 F. 2d 1382, 1389 (1972); Church v. Hamilton, 3d Cir.,444 F. 2d 105, 106 (1971); Hopkins v. Wasson, E.D. Tenn., 227 F. Supp. 278, 281 (1962), aff'd 6th Cir., 329 F. 2d 67 (1964), cert. denied 379 U.S. 854 (1964). The reference to discriminatory hiring is unsupported by factual allegations, Fletcher v. Hook, 3d Cir., 446 F. 2d 14 (1971); Guedry v. Ford, 5th Cir., 431 F. 2d 660 (1970), and of doubtful merit in view of the plaintiff's continued status with the housing authority.

An order will be entered sustaining the defendants' motion for summary judgment and dismissing the complaint.

September 11, 1974 /s/ Mac Swinford, Judge

(Retyped Copy)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 1752

COVINGTON HOUSING DEVELOPMENT CORPORATION, ET AL — PLAINTIFFS

V.

CITY OF COVINGTON, ET AL — DEFENDANTS

ORDER

The order of this court, entered on september 11, 1974, on a finding that a motion for summary judgment filed by the defendants was sustained, failed to state the names of the defendants, Joseph T. Condit and Bill L. Woods, who had filed a separate motion for summary judgment on August 8, 1974.

The order of September 11, 1974 is hereby amended to include among the named defendants set forth in the order the name of Joseph T. Condit and Bill L. Woods.

September 13, 1974 — /s/ Mac Swinford, Judge
(Retyped Copy)

No. 74-2196

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COVINGTON HOUSING DEVELOPMENT CORPORATION, A Kentucky Corporation
EDDIE THOMPSON, JR.,
Plaintiffs-Appellants,
v.
CITY OF COVINGTON, et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 23, 1975.

Before: PHILLIPS, Chief Judge, McCREE and LIVELY, Circuit Judges.

PER CURIAM. This is an appeal from an order dismissing a complaint brought under 42 U.S.C. §§ 1981 and 1983 to redress discrimination alleged to have been practiced by the City of Covington and certain of its officials in connection with the development of residential areas under the Demonstation Cities and Metropolitan Development Act, 42 U.S.C. § 3301, et seq. The action against the City of Covington was dismissed in an earlier order from which an appeal was not taken on the ground that a municipality is not a person for the purposes of these Civil Rights Acts. The action was brought by Eddie Thompson, a Negro, who is the executive director of the Covington Housing Development Corporation

(HDC) and in behalf of the corporation. The summary judgment dismissing the action determined that the corporate plaintiff was not properly a party because its directors had not authorized the executive director to initiate the action. The district court also dismissed the action against Thompson on the ground that his reference to discriminatory hiring was unsupported by factual allegations.

The district court correctly held that the individual plaintiff Thompson was not authorized to initiate or prosecute this action on behalf of his corporate employer. The record discloses no direction to sue or consent by the board of directors of HDC to this suit on behalf of the corporation by Thompson.

In the complaint Thompson also sought relief for violation of his civil rights. He may not recover personally for wrongs allegedly suffered by the corporation which he directed. He and the corporation are separate beings in the eyes of the law. We have carefully searched the record for evidence that the civil rights of the plaintiff Thompson have been infringed by any of the defendants-appellees and have found none. The district court had no jurisdiction over claims of slander by the defendants or injury to Thompson's reputation. It could only consider infringement of rights protected by the United States Constitution or the Civil Rights Act under which this action was brought, 42 U.S.C. §§ 1981 and 1983. Our review of the record leads to the conclusion that no showing of such infringement was made, and that the defendants were entitled to judgment in their favor as a matter of law. Under these circumstances summary judgment was properly granted.

Affirmed. No costs on appeal.

NO. 74-2196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COVINGTON HOUSING DEVELOPMENT CORPORATION,
A Kentucky Corporation
EDDIE THOMPSON, JR.

Plaintiffs-Appellants

v.

CITY OF COVINTON' et al.

Defendants-Appellees

ORDER

BEFORE: PHILLIPS, Chief judge, McCREE and LIVELY, Circuit Judges.

Plaintiff-appellants' petition for rehearing with a suggestion for rehearing en banc having come on for consideration and less than a majority of the judges having favored consideration en banc, the petition has been referred to the original panel.

Upon consideration of the petition for rehearing, the court concludes that the issues raised therin were fully considered prior to the initial disposition of the case. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Filed June 5, 1975
(Retyped Copy)

Clerk /s/ John P. Hehman

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-170

EDDIE THOMPSON, JR.,
Petitioner,

vs.

CITY OF COVINGTON, et al.,
Respondents.

BRIEF OF RESPONDENTS IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-170

EDDIE THOMPSON, JR.,

Petitioner,

vs.

THE CITY OF COVINGTON, BERNARD GRIMM, WILLIAM SAGESER, CARL BOWMAN, GEORGE WERMELING, JAMES SIMPSON, PAUL ROYSTER, JUNE HEDRICK, DAN WOLFE, JOE CONDIT, BILL WOODS, ROGER CARLTON AND HOBART WOOTEN,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, CITY OF COVINGTON, BERNARD GRIMM, WILLIAM SAGESER, CARL BOWMAN, GEORGE WERMELING, JAMES SIMPSON, PAUL ROYSTER, JUNE HEDRICK, DAN WOLFE, JOE CONDIT AND BILL WOODS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case was commenced in the United States District Court for the Eastern District of Kentucky by the Petitioner, Eddie Thompson, Jr., and the Covington Housing Development Corporation (hereinafter H.D.C.) against the City of Covington, and Mayor, Commissioners and certain employees of the City and two HUD Representatives

under Title 42, United States Code, Sections 1981 and 1983.

The City of Covington filed a Motion to dismiss it as a party-defendant since it was not a proper party defendant, as it was not a person within the purview of the Civil Rights Act.

Subsequently, the City of Covington filed an Answer, setting forth as some of its defenses the facts set forth in its Motion heretofore referred, and the fact that the Plaintiff, Covington Housing Development Corporation, should be dismissed, since it did not authorize the filing of this action.

The Defendants-Respondents, Bernard Grimm, William Sageser, James Simpson, Carl Bowman, George Wermeling, Paul Royster, June Hedrick and Dan Wolfe, filed their Answer, setting forth as part of their defense that fact that the Plaintiff, H.D.C., did not authorize the filing of this action. To the same effect were the Answers of the Defendants-Respondents, Billy L. Woods and Joseph T. Condit.

On November 20, 1973, the depositions of Eddie Thompson, Jr. and Broadus Blythe, Chairman of the H.D.C., were taken by the defendants.

On December 18, 1973, the District Court dismissed the defendant, City of Covington, as a party defendant.

The Plaintiffs served Interrogatories, in April of 1974, upon the Defendants, Paul Royster, Bernard Grimm, George Wermeling, William Sageser, James Simpson, June Hedrick and Dan Wolfe. Subsequently, they filed a Motion for Summary Judgment and an Order dismissing the Plaintiff, H.D.C., as a party plaintiff, with a Memorandum in support. Subsequently, the Plaintiffs filed a Brief in opposition to said motion. Thereafter, the said Defendants-Respondents filed a Reply Brief.

On June 26, 1974, the Plaintiffs filed a Motion for Summary Judgment with a Brief in Support thereof. On July 11, 1974, the Affidavit of June Hedrick was filed and on July 12, 1974, a Reply Brief to Plaintiff's Motion for Summary Judgment was filed.

On August 8, 1974, the Defendants-Respondents, Joe Condit and Billy L. Woods, filed their motion for Summary Judgment with a Memorandum in support thereof.

On September 11, 1974, the District Court entered an Order and Memorandum sustaining the Motion of the Defendants-Respondents, Bernard Grimm, William Sageser, Carl Bowman, James Simpson, George Wermeling, Paul Royster, June Hedrick and Dan Wolfe, for Summary Judgment and dismissing the Complaint. On September 13, 1974, the District Court entered an Order amending the Order of September 11, 1974, to include the Defendants-Respondents, Joe Condit and Billy Woods, as to sustaining Motion for Summary Judgment as to them.

On October 11, 1974, a Notice of Appeal was filed with regard to the Order of September 11, 1974.

On April 23, 1975, the United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court stating that it was correct in holding that the individual Plaintiff, Thompson, was not authorized to initiate or prosecute this action on behalf of his corporate employer, and that the civil rights of Thompson have not been infringed.

On May 6, 1975, Thompson, filed a motion in the Court of Appeals for a rehearing en banc, which was refused on June 5, 1975.

(FACTS)

The idea of a housing development corporation had been in existence approximately two years. HUD's letter of December 1, 1971, raised certain questions pertaining to the revolving loan fund and questions in relation to the Housing Development Corporation Project. Part of these questions were answered on or about February 24, 1972. However, the project was on "hold" until these questions were resolved.

The "hold" action remained in effect until mid October, 1972, and at that time it was released because all questions had been adequately answered. As a result, the project began to staff up.

Originally, the American Urban Peoples Coalition (a corporation), in June 1972, requested to become the operating agency for the Housing Development Corporation Project. At this time, Eddie Thompson, Jr. was the President or Officer of this corporation. However, it was a corporation organized for profit and Federal Regulations prohibited it from holding and using the monies under the program involved.

Thus, the non-profit corporation called the Covington Housing Development Corporation (H.D.C.) was formed by an attorney, apparently retained by Eddie Thompson, Jr., on or after August 27, 1972.

Five members of the Board of Directors were appointed by the American Urban Peoples Coalition, and five members of the Board of Directors were appointed by the Mayor and Board of Commissioners of the City of Covington, in various fields of endeavor, so as to give the expertise and knowledge of all facets of housing construction.

The H.D.C. entered into a contract with the City of Covington, and said contract is dated October 5, 1972.

Dave Johnson, a Black, was the Acting Director of the Model City's program at that time (and was the Acting Director until Janury 29, 1973). Eddie Thompson, Jr., after his appointment as the Executive Director of the H.D.C., on or after October 11, 1972, conferred with Dave Johnson, for all policy matters concerning the H.D.C., and only went to the Staff of the Model City's program for implementation of decisions that they had already reached.

On December 5, 1972, the scope of services which had been previously prepared by Dave Johnson and Eddie Thompson for the Third Action Year starting December 1, 1972, was rejected by HUD and a new one requested. A letter from HUD advised that no supplemental funds should be expended until an adequate scope of services and production schedule was submitted. Further, it was required that the source of funding which would be drawn in by the supplemental funds should be identified. After the rejection of December 22, 1972, Eddie Thompson then came to June Hedrick for approval of the budget and scope of services that had been prepared by Eddie Thompson, Jr., and for assistance in developing this into an acceptable form so as to get the Housing Development Project off of "hold" with HUD. The scope of services referred to was submitted to HUD on December 14, 1972, in an extremely inadequate manner, according to HUD.

HUD's letter of December 22, 1972, outlined what changes would be necessary to bring the scope of services to an adequate level.

A new scope of services had been sent to HUD on January 2, 1973.

On January 5, 1973, a Moratorium was announced by the Federal Government on all subsidized housing programs. This Moratorium cut off all funds, except for existing, operating programs. Due to the fact that this

original contract with the City was signed in October, 1972, and extended through November 30, 1972, there had not been sufficient time to get this program into an operating condition when the sudden Federal Moratorium was announced in January, 1973.

The success of the H.D.C. was totally removed by this Moratorium.

Dave Johnson, who was the Acting Director of the Model City Program until January 29, 1973, had the duty to inform the City Commission of the activities of the Model City's program, to present the facts and reports, etc., which would have, and did include the H.D.C., for approval by the City Commission.

The Department of Housing and Urban Development (Atlanta E.E.O. Office), conducted an investigation of the charge filed with them by Eddie Thompson, Jr., charging racial discrimination and found no factual evidence in support of his claims. The letter of November 27, 1973, from the Regional Administrator is attached hereto as an exhibit. Appendix to Brief of Defendant-Appellees as filed in the Sixth Circuit Court of Appeals, P. 100.

ARGUMENT

The Petition for a Writ of Certiorari should be denied for the reasons that:

I. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE DISTRICT COURT IN GRANTING THE RESPONDENT, CITY OF COVINGTON, MOTION FOR SUMMARY JUDGMENT WAS CORRECT UNDER APPLICABLE LEGAL PRINCIPLE.

a) The District Court was required by Established Judicial Precedent to Dismiss the City of Covington as a Defendant to this Action.

The first issue presented by the Petitioner for review to the Court concerns whether the Trial Court was correct when, in its Order of December 18, 1973, it dismissed the City of Covington as a Defendant.

The District Court in dismissing the City as a defendant in this action followed established judicial precedents. The legislative aims of 42 U.S.C. § 2983, which this action was commenced under, was thoroughly discussed by this court in *Monroe* v. *Pope,* 365 U.S. 167 (1961). In *Monroe* the court concluded that a municipality is not a "person" within the purview of the aforementioned section of the United States Code stating the following:

> the response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by this Act . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them. *Id.* at 191.

See also, *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Patrum* v. *City of Greensburg, Kentucky,* 6th Cir., 419 F2d 1300 (1969) cert. denied 397 U.S. 990 (1970); *Deane Hill Country Club, Inc.,* v. *City of Knoxville,* 6th Cir., 379, F2d 321 (1967), cert. denied 389 U.S. 975 (1967).

The petitioner's vicious allegations that the City's attorney, Charles Wagner, along with respondent Joseph Condit prevented his former counsel, Clifford Fennell, from submitting a brief or from attending depositions in reply to the City motion to dismiss are completely unsupported by any kind of factual references. In fact, the allegations are so frivolous that the petitioner failed to raise it in his brief to the Sixth Circuit Court of Appeals.

In reply to the question which was raised by the petitioner concerning the desirability of the City under 42 U.S.C. Sec. 3301 and 3303 we direct the Court's attention to a copy of the original complaint, (Appendix of Defendants Appellees filed in the Sixth Circuit Court of Appeals, P. 1) which shows that the only section of the United States Codes which this action was commenced under were 42 U.S.C. 1981 and 1983. No where in the complaint were sections 3301 and 3303 raised. Since, there has been no amendment to the original complaint the petitioner's reference to 3301 and 3303 is unwarranted.

b) The Court of Appeals Did Not Have Jurisdiction To Hear the Issue of the Dismissal of the City of Covington For Rule 4 (a) of the Federal Rules of Appellate Procedure Requires that an Appeal Be Taken Within Thirty Days of the Entry of the Order, Which the Petitioner Failed To Do.

The Sixth Circuit Court of Appeals has a statutory requirement that appeals from District Courts must be filed

within a prescribed period. Rule 4 (a) of the Federal Rules of Appellate Procedure, provides in part:

> In a civil case . . . in which as appeal is permitted by laws as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment of order appealed from . . .

Since the order to dismiss the City of Covington was entered on December 18, 1973, it is evident, to all except the petitioner, that the thirty day appeal period had long expired when Notice of Appeal was filed on October 11, 1974. Therefore, Thompson's contention that the Court of Appeals erred is just one of his numerous ficticious allegations.

Further, the Court should also note that the petitioner's petition is void of any fact supported allegation that the City of Covington discriminated against him or any other person, black or white, in its dealings with the H.D.C.

II. NEITHER THE ARTICLES OF INCORPORATION OR THE BY LAWS OF THE COVINGTON HOUSING DEVELOPMENT CORPORATION AUTHORIZED EDDIE THOMPSON TO FILE THIS ACTION IN THE NAME OF THE CORPORATION.

The Petitioners ask rhetorically "What proof was there in the original record that Thompson was not authorized to file this suit on behalf of the Corporation?" First, even though the petitioner's brief has the Covington Housing Development Corporation as a petitioner, it is well worth noting that only Eddie Thompson appealed the decision of the Sixth Circuit Court of Appeals as is evident by the

official records of this Court. Hence, it is obvious that the aforesaid question deals with a segment of the decision of the lower court which is not on appeal before this tribunal. However, we will address this matter only to clarify the situation at bar, which is Eddie Thompson's alledged grievance.

It is well established in the case law of the Commonwealth of Kentucky that the governing power of the corporation is vested in the Board of Directors, which can only bind the corporation when acting as a body. *Har-Bel Coal Co.* v. *Asher Coal Mining Co.,* (Ky.) 414 SW 2d 128 (1966). In *Har-Bel Coal Co.,* supra, the court stated the following:

> "Authority to bind the corporation must come either from the by laws or the board of directors, or the action of the officer must be of the nature that comes within the apparent scope of his employment. . . . the mere representation of a claimed agent, even when coupled with signing a paper in such capacity, are not sufficient to show his agency or the extent thereof." *Id.* at 130.

Even this power is negated in the event of internal corporate dissension regarding the propriety of the suit. *Contee Construction Co.* v. *Cay Construction Co.,* Fla. 221 So 2d 792 (1969); Note, 50 Ky. L. J. (1961).

The Kentucky Legislature has also acted in the area in which this court is now reviewing. Section 271A.250 (2) of the Kentucky Revised Statutes (hereinafter KRS) states the following:

> "All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be determined by resolution of the board of directors not inconsistent with the by laws."

Although the HDC was incorporated under KRS Chapter 273, the provision of KRS Chapter 271.A are applicable to "any relating to a corporation of that kind either are unconsistent with this chapter or state that the provisions of this chapter not apply to it." KRS 271A.015 (1).

Both the aforesaid cases and statute restrict the actions of all corporate officers and agents to only those stated in the by laws or authorized by the board of directors. Therefore, in order for Thompson to have the authority to file this suit, such power must have been vested in him by either the by laws or by resolution from the board of directors.

The Board of Directors of HDC did not authorize Thompson to initiate this proceeding.

A review of the records will plainly show that Eddie Thompson never received board authorization in filing this suit. First, the chairman of the board of the HDC, Broadus Blythe, has testified under oath in his deposition that the Board of Directors did not give the petitioner, Thompson, the authority to file this action in the Corporation's behalf. (Blythe Deposition, Questions 23, 75 to 80, inclusive).

Secondly, the petitioner's failure to produce records of the Board which specifically sanction this action ignores the "well settled doctrine that a corporation can only act through its directors at an official meeting regularly held, and that its acts can be proven only by the records of such meetings". *Bastin* v. *Givens, Admrx.*, 170 Ky. 201 (1916); *Clay* v. *Mt. Holly Development Company*, Ky., 646 SW 2d 621 (1971); *Star Mills* v. *Bailey*, 140 Ky. 194 (1910). The fact that no "official meeting" of the Board ever sanctioned this action is one even admitted to by the petitioner himself. (Thompson's Deposition Question 36). Thompson's reliance

on informal conversation with some of the Board Members for authorization to commence this suit negates the principle that a business will not be bound by agreements secured among isolated directors. *Caddy Oil Company* v. *Sommer,* 186 Ky. 843, 847; see 19 Am Jur 2d "Corporations", Section 1157.

It is evident that the Board of Directors of HDC never formally authorized the initiation of this suit.

The by laws did not grant the Executive Director the power to initiate this suit.

The fact that Thompson fails to get the board to authorize the filing of this suit leaves the by laws as his only possible means for authorizing it. A review of the facts will show that the by laws do not grant the Executive Director the power to initiate a suit of this magnitude.

The by laws of the HDC creates the position of Executive Director and defines his duties. Article 5, Section 4, of the by laws reads as follows:

> The Executive Director shall be the Chief Executive Officer of the corporation. He shall have custody of the Corporation funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation. He shall deposit all monies and other valuable effects in the name, and to the credit of the corporation in such depositories as may from time to time be designated by the Board of Directors. He shall have all of the general powers and duties which are usually vested in the office of the Chief Executive Officer of the Corporation.

Since the power to initiate suits is not among those powers which are specifically given to the Executive Director, the petitioner must believe that the power rests

within the general powers of that office. However, it is well settled that a manager's authority is limited to the conduct of ordinary business affairs:

> (T) he general business of corporations is frequently entrusted to the management of a general manager . . ., who has the power to bind the corporation by acts within the scope of his apparent authority. Such authority is not limited by the fact that the general manager is also the president or other officer of the corporation, for it is not incident to such other office, but is incident to the management of the business . . . . He has been deemed by numerous authorities to be the principal officer of the corporation, having general charge of those business matters for the carrying on of which the company was incorporated, and he has the implied or ostensible power to do any act which is usual or necessary in the ordinary transaction of the company's business. 19 Am. Jur. 2d "Corporations" Section 1174, p. 599.

See Also *Gaddie v. Collins of Kentucky*, Ky., 248 S.W. 2d 722, 723 (1952). It is evident that this litigation relates not to the ordinary business affairs of the corporation, but rather is an extraordinary attempt outside the usual course of business.

It should be further noted that the minutes of the Board of Directors for the October 25, 1972 meeting state: "Mr. Thompson also makes it clear anything he does needs Board approval." It is also questionable as to whether Eddie Thompson was the Executive Director at the time this action was filed or, for that matter, at the present time, when the corporate minutes of November 29, 1972 are considered.

Also, the minutes of the Board of Directors of the HDC for March 13, 1973, terminated all employees, including the Petitioner, effective as of March 16, 1973, and other-

wise terminated the entire enterprise. The District Court was aware of this as it referred to the fact that this litigation was not in the ordinary course of business but rather was an attempt to revive an enterprise which the corporation had ordered terminated.

As to the petitioner's reliance on *Elk Valley* v. *Thompson,* 150 Ky. 614, 150 S.W. 817, a careful analysis of the case discloses that it affords no more support to the Petitioner's argument than do the other cases cited in his petition.

In *Elk Valley* the appellee received a judgment from the lower court which executed a contract that was enacted by the general manager without the authorization of the Board of Directors. In overruling the lower Court, the Court of Appeals stated the general rule which the Petitioner so wholeheartedly contends authorized his initiation of this suit in the name of the H.D.C. (Petitioner's Brief p. 8) However, Eddie Thompson's position must fail for the exact same reason that H. C. Thompson failed in the aforesaid case. The court stated:

> Applying to the facts of this case these well established principles, the case of H. C. Thompson must fail for two reasons: (1) It is not clearly shown that the corporation derived any benefit from his services . . . . Nor does it appear that he suffered any loss by the failure of the directors, when their attention was called to the fact that he had a contract, to promptly disaffirm it. (2) It is not shown that the directors, who, according to H. C. Thompson knew of the contract, were advised fully or at all of the circumstances surrounding its execution. It only appears that they knew of the existence of the contract.

A brief look at the factual background of this action shows that the H.D.C. has not been shown to have derived

any benefits from this suit. In fact, this suit, as well as Eddie Thompson, has proven to be a detriment to the H.D.C. in that the Corporation has been charged with the responsibility of paying previous court costs.

Further, the petitioner has likewise failed to show that the directors who, according to him knew of this suit, were advised fully or at all of the circumstances surrounding its initiation.

It is evident that Blythe, the Chairman of the Board of Directors, did not know the underlying circumstances surrounding this litigation for he testified that there was no action that would lead him to believe that the H.D.C. was closed on account of racial reasons. (Question 90, Blythe Deposition) Therefore, acknowledging the fact that he knew of no factual basis or circumstances for Thompson's charges of racial discrimnatory practices by the Respondents.

Thus viewed, the *Elk Valley Coal Co.* decision is of no assistance to the Petitioner.

Thompson's query into the matter of the legality of suing a party in his representative capacity and then saying that said party cannot sue in this representative capacity is totally unmeritorious in that such a sequence never occured among the parties involved in this litigation. An examination of the record will reveal that there are no facts which show that the Petitioner was sued in his representative capacity as the General Manager of the Corporation. Also, it should be noted that this question was not raised in the petitioner's brief filed in the Sixth Circuit Court of Appeals.

III. THE MODEL CITY PROJECT IN WHICH EDDIE THOMPSON WAS ASSOCIATED WAS NOT PHASED OUT ILLEGALLY BY THE RESPONDENTS. THUS NONE OF THE PETITIONER'S RIGHTS WHICH ARE GUARANTEED BY THE FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS TO TITLE 42, U.S.C. SECTIONS 1981 AND 1983 HAVE BEEN TRANSGRESSED.

The employees of a Model City project which is proven to have been illegally phased out for racial reasons would be entitled to any back wages owing to them. However, that is not the case in Thompson's situation for such a racial premise has never been proven to have existed. As previously mentioned in the facts of this proceeding, the HDC project was merely on hold when the Federal Moratorium of January, 1973 was put into effect. It was this moratorium which was the underlying cause for the termination of Model City project with which the petitioner was involved. Thompson's allegation that the respondents caused the curtailment of said project is not one based on actual factual references which this Court can view of their merits, but rather is one based on a fantasy that Thompson's mind can alone grasp.

There exists no proof whatsoever that the respondents, Bernard Grimm, James Simpson, William Sageser, Carl Bowman, and George Wermeling, who are the Mayor and City Commissioners of the City of Covington, violated any of Thompson's federally protected rights in their dealings with the Model City program. In fact, the Petitioner's

testimony in his deposition reveals, from his own mouth, that there is and was no discrimination against him by them. (Questions 181 to 190, inclusive; Question 316; Questions 684 and 685; Questions 756 to 764, inclusive, and the answers thereto of Thompson's Deposition)

The Petitioner's charges against Joseph Condit, Bill Woods, Paul Royster, June Hedrick and Dan Wolfe are likewise devoid of any supporting evidence.

The Model City program with which Thompson was associated was in its infancy and as late as December 26, 1972, had no idea of what they were going to do. Thus it is obvious that, when the Federal Moratorium was announced on January 5, 1973, Eddie Thompson and the Covington Housing Development Corporation, on their own part and knowledge, were woefully lacking and that any deficiencies were a product of theirs and not others, Further, the Court should note that the H.D.C. was not the only segment of the Model City Program involved in the freeze of monies, for the entire Program was supposed to be phased out by July 7, 1973.

It is apparent that the Petitioner has no personal remedy for injuries suffered by the Covington Housing Development Corporation. *Mullins* v. *First National Exchange Bank of Virginia,* W.D. Va., 275 F.Supp 712, 721 (1967).

North City Area-Wide Council, Inc. v. *Romney,* 469 F2d 1326 (1972) and *Rodriquez* v. *Barcelo,* 358 F.Supp 43 (1973) which are cited by the Petitioner in his behalf, can easily be distinguished from the case at bar because in those proceedings, the plaintiffs' allegations were supported by facts in which the courts could base a decision. Thompson's case is made up of a series of unproven allegations.

As for the Petitioner's allegation that he has been forced into involuntary bankruptcy by the City and its officials, he is again attempting to play on the passions of this Court. First, Thompson has testified in his deposition that he was employed from June 13, 1973 to September 25, 1973 at the Housing Development Corporation in Cincinnati at a salary of $362.00 per week and at the Turner Construction Company from October 23, 1973 to at least the date of the deposition, November 29, 1973, at the yearly salary of $13,900.00. Also, it is well worth noting that the petitioner presently owns the following real property:

1) His home at 734 Highland Avenue, Covington, Kentucky Purchased on February 1, 1966. Assessed value for 1974 is $15,000.00

2) A building on the N.W. corner of Greenup and Robbins Streets. Purchased on August 8, 1973. Assessed value for 1974 is $7,000.00.

3) A building at 309 Pleasant Street, Covington, Kentucky. Purchased on February 2, 1974. Assessed value for 1974 is $8,500.00.

Thompson also owns stock in the American Urban People's Economic Development Company, which is a corporation for profit located in Covington, Kentucky. Further, in January or February of 1975, the petitioner purchased a 1969 Oldsmobile, and there are no liens of record against this automobile. Thus, he must have paid cash for it.

Although, in all due fairness to the Petitioner, we do not claim to know the duration of his employment at the Turner Construction Company, however, it is still evident that the termination of the Model City Program in 1973

did not force him into the state of dispair as he has led this Court to believe.

In responding to that segment of the Petitioner's allegation which states he was injured by the illegal phasing out of the Model City Program, we will first remind this Court that there is no evidence on which the Petitioner's accusation of illegality can be grounded. Secondly, if in fact Thompson was injured by the phasing out of the Model City Program, his remedy would not rest with any of the named respondents, but would lay exclusively with that section of the Federal Government which ordered the 1973 Moratorium (which was not illegal).

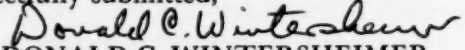
CONCLUSION

The Petition has not shown that there are any reasons for a Writ of Certiorari to be issued for the review of this case pursuant to Rule 19(1) of the Rules of the Supreme Court of the United States.

The record of the District Court contains, in the Petitioner's behalf, only his complaint. However, the deposition of Broadus R. Blythe, Chairman of the Board of Directors of the Corporation, the deposition of the Petitioner, himself, the interrogatories and answers thereto and the official corporate minutes of the corporation are contrary to and disprove totally the allegations of the complaint. Thus, the District Court acted properly in granting Summary Judgment. On review, the Sixth Circuit Court of Appeals independently reviewed the record and arrived at the same conclusion that the respondents were entitled to Judgment in their favor as a matter of law.

The decision of the United States District Court for the Eastern District of Kentucky as well as the Sixth Circuit Court of Appeals were legal, just and proper.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY & TRECKER CORPORATION IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY & TRECKER CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203 (1975), and reprinted in Appendix B of the Petition (Pet. App. A-2 ff.). The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are not officially reported but appear as Appendix C and Appendix D to the Petition (Pet. App. A-15 ff. and A-22 ff.). The Circuit Court decision is unofficially reported at 88 LRRM 2920.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

May the State of Wisconsin prohibit a Union-directed concerted refusal to work overtime, a partial-strike activity which is neither protected nor prohibited by Federal law?

STATUTES INVOLVED

The relevant constitutional and statutory provisions are included in Appendix E of the Petition (Pet. App. A-52 ff.).

STATEMENT OF THE CASE

The Kearney & Trecker Corporation ("Kearney & Trecker" or "Employer") is engaged in the manufacture of machine tools at West Allis, Wisconsin. At all times relevant hereto, the hourly employees at Kearney & Trecker Corporation have been represented by Lodge 76, International Association of Machinists and Aerospace Workers ("Union" or "Lodge 76").

Prior to March 7, 1972, Kearney & Trecker employees represented by Lodge 76 had been scheduled for and had worked a "substantial amount" of overtime (A. App.[1] 154). In fact, on Saturday, March 4, 1972, approximately 354 employees worked overtime (Co. Ex. 1; A. App. 156; Supp. App.[2] 102; R. 86). Although employees

[1] Appellant's Appendix in the Supreme Court of Wisconsin ("A. App.").

[2] Intervenor-Respondent's Appendix in the Supreme Court of Wisconsin ("Supp. App.").

had previously been allowed, individually, to refuse overtime, there had been no general, or concerted, refusal to do so (A. App. 154). Only five percent of the employees had consistently declined to work overtime (A. App. 154).

On March 7, 1972, while negotiations for a new labor agreement were continuing, the members of the Union met pursuant to notice from the Union and unanimously adopted a resolution directing that no member should work overtime, overtime being defined as working in excess of 7½ hours per day or 37½ hours per week (A. App. 153, 159; R. 104-105). On March 16, representatives of the Union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the members "will continue in effect until a labor agreement is signed" (Ex. 13; R. 80, 160; A. App. 155). Despite requests from Kearney & Trecker, the Union declined to ask the membership to rescind the ban on overtime (A. App. 155). From March 11, 1972 until July 23, 1972 no employees worked overtime (with the exception of three employees who worked overtime on only one day), even though the Employer had scheduled many of the employees for overtime on numerous occasions during that period (A. App. 155-158).

On June 12, 1972, the Employer filed a charge with the National Labor Relations Board ("NLRB") alleging, among other things, that the Union had violated Section 8(b)(3) of the National Labor Relations Act, as amended, ("NLRA") 29 U.S.C. §158(b)(3), by its ban on overtime (Co. Ex. 7; A. App. 147-150). On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the Union's action was not

prohibited by the NLRA (Co. Ex. 3; A. App. 144-146). That refusal stated, in part:

> "Dismissal by this Agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act." (Co. Ex. 3; A. App. 145).

On June 15, 1972, the Employer filed a complaint with the Wisconsin Employment Relations Commission ("WERC") (A. App. 127). After a hearing, a WERC examiner found, on February 26, 1973, that the Union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the Employer's production and that the Union had therefore violated Section 111.06 (2) (h), Wis. Stats., which prohibits, *inter alia,* engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (Petition Appendix ["Pet. App."] A-53). The examiner rejected the Union's challenge to the WERC's jurisdiction on the basis of this Court's decision in *Garmon,*[1] concluding that "a concerted refusal to work overtime is neither a protected activity under Section 7 [of the NLRA] nor a prohibited activity under Section 8 of the [NLRA]" (Pet. App. A-48). The WERC unanimously adopted the examiner's decision as its own on April 23, 1973 (Pet. App. A-22-23). On August 24, 1973 that decision was affirmed by the Circuit Court of Milwaukee County which also rejected Petitioners' preemption arguments on the basis of prior decisions of this Court (Pet. App. A-15-19).

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[1] *San Diego Building Trades Council, et al. v. Garmon et al.,* 359 U.S. 236 (1959).

The Union then appealed to the Wisconsin Supreme Court. On appeal, the Union did not deny that it had violated the statute in question, but again argued that Wisconsin's authority to enjoin such conduct had been preempted by Federal law. Relying on prior decisions of this Court, including those in *Garmon, Garner,*[2] and *Briggs and Stratton,*[3] the Wisconsin Court unanimously rejected the Union's argument stating "since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the Federal Labor Act the judgment appealed from must be affirmed" (Pet. App. A-14).

ARGUMENT

I. CERTIORARI SHOULD BE DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The challenged decision of the Wisconsin Supreme Court simply upheld the authority of Wisconsin to enjoin a union-directed concerted refusal to work overtime, a very specific, seldom used partial-strike tactic which has been *uniformly* held to be beyond the protection of Federal law by a long line of NLRB and Federal Court decisions. One of the many[4] such cases is *Valley City*

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[2] *Garner et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953).

[3] *International Union, UA.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), commonly referred to as *"Briggs and Stratton."*

[4] *E.g., John S. Swift Co.,* 124 NLRB 394 (1959), *modified and enf'd,* 277 F.2d 641 (7th Cir. 1960); *Decision, Inc.,* 166 NLRB 464 (1967); *First National Bank of Omaha v. NLRB,* 413 F.2d 921, 925 (8th Cir. 1969); *Prince Lithograph Co., Inc.,* 205 NLRB No. 23, 83 LRRM 1654, 1973 CCH NLRB ¶25,614; *Valley City Furniture Co.,* 110 NLRB 1589 (1954); *Polytech, Inc.,* 195 NLRB 695 (1972).

Furniture Co., 110 NLRB 1589 (1954), where, as here, the Union had resolved during bargaining to cease working overtime. The NLRB held that refusal to be unprotected, stating at 1594-1595:

> "We find that the partial strike [refusal of overtime] called by the Union from its very inception was the sort of activity which, although concerted, *is not,* as against the action by the Respondent, *entitled to the protection of the Act.* The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. . . ." (Emphasis supplied).

The Board only recently reaffirmed and explained this line of decisions in *Polytech, Inc.*, 195 NLRB 695, 696 (1972), stating:

> "The holding . . . that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay. The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform *all of the work they were hired to do.*" (Emphasis supplied).

Contrary to Petitioners' assertion, the Wisconsin Court's decision, by its very terms, has *no impact whatsoever* on Federally protected strike activities or on the Federal regulation of activities proscribed by Federal law (Pet. App. A-8, 12, 14). That decision does not in any way expand, or seek to expand, the limited role of the states in the field of labor relations. On the contrary,

the Wisconsin Court expressly recognized in its decision that,

> ". . . a State may not regulate conduct arguably 'protected by sec. 7 or prohibited by sec. 8' of the National Labor Relations Act, . . . and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." (Pet. App. A-8).

The Wisconsin Court did conclude, correctly, on the basis of this Court's prior holdings, that a concerted refusal to work overtime is *neither* arguably protected nor prohibited, and that no legislative purpose precludes state action against such conduct.

Petitioners' predictions of grave consequences and infringements on protected rights if this decision is not reversed are totally unfounded. The Wisconsin statutory provision in question has been in existence in its present form for *36 years*. The authority of Wisconsin to utilize that very provision to prohibit *very similar* conduct was upheld by this Court *26 years ago* in *"Briggs and Stratton."*[5] Surely any such grave consequences would have occurred long ago — and Petitioners cite none. Moreover, this case is the *only reported instance*[6] during those 36 years in which Wisconsin has enjoined or even been asked to enjoin a concerted refusal to work overtime (Pet. App. A-49).

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[5] *International Union, U.A.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

[6] Undoubtedly, this tactic is not used more frequently precisely because it *is* unprotected under Federal law and participating employees may be disciplined by the employer. *E.g., Valley City Furniture Co.,* 110 NLRB 1589 (1954). *This* case arose because the employer chose to enjoin the perpetrating Union rather than discipline the individual employees who had been directed by the Union partially to withhold their services.

Having had no restraining effect upon strike activities or other concerted conduct protected by Federal law and being directed solely at the limited partial-strike conduct held *not* federally-protected by the NLRB and by the Federal courts, the policy of Wisconsin heretofore approved by this Court in *Briggs and Stratton* and now embodied in the decision of the Court below is one of extremely limited impact, and clearly does not present a substantial federal question. The Wisconsin Court's decision here, is thus not one appropriate for review by this Court.

II. THE DECISION OF THE WISCONSIN COURT DOES NOT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

Petitioners try to show that the decision below is inconsistent with prior decisions of this Court, but that is simply not the case. To the contrary, this Court affirmed Wisconsin's right to enjoin *very similar conduct* on the basis of this very statute in *"Briggs and Stratton", supra.* There, the union in order to put pressure on the employer, called a series of union meetings during working hours and the WERC,[7] on the basis of the instant statute, issued an order enjoining the conduct. On appeal, this Court affirmed Wisconsin's right to forbid that conduct, stating (336 U.S. at 264-265):

> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was *neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act.* . . .

[7] Then known as Wisconsin Employment Relations Board ("WERB").

> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." (Emphasis supplied).

The Union's conduct, here, being quite similar to that involved in *Briggs and Stratton,* that holding is equally applicable to this case. In both cases, the Union allowed its members to work only a portion of their normal hours, thereby putting substantial economic pressure on the employer without imposing on the Union members the consequences of a strike. Both activities have repeatedly been held by the NLRB to constitute unprotected partial strikes. *E.g., Valley City Furniture Co., supra,* (concerted refusal to work overtime); *Daniel A. Donovan, et al.,* 206 NLRB No. 108, 1973 CCH NLRB ¶25,888, 85 LRRM 1227 (intermittent work stoppages); *Honolulu Rapid Transit Co.,* 110 NLRB 1806 (1954) (intermittent work stoppages).

This Court in *Briggs and Stratton* clearly indicated that its holding in that case was equally applicable to a concerted refusal to work overtime. In concluding that the work stoppages were not protected by Section 7 of the NLRA, this Court cited "similar cases" holding "comparable work stoppages" to be unprotected, including *C. G. Conn, Ltd. v. NLRB,*[8] which held a *concerted refusal to work overtime* to be unprotected. 336 U.S. at 257.

Notwithstanding Petitioners' assertions, the Wisconsin Court correctly concluded that *Briggs and Stratton* has never been overruled (Pet. App. A-13). Although this

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[8] 108 F.2d 390 (7th Cir. 1939).

Court did decline, in *Garmon,* to follow the "approach" of *Briggs and Stratton,* under which the Court itself, rather than the NLRB, determined the protected or prohibited nature of the activity, that decision left untouched its substantive holding.[9] In fact, the continued vitality of the Court's substantive ruling in *Briggs and Stratton* was expressly confirmed by the concurring opinion in *Garmon*:

> "The Court may be correct in stating that 'the approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, . . ." (359 U.S. at 253, n. 5).

The decision here is also *fully* consistent with this Court's decision in *Garmon*[10] setting forth the controlling principles of federal preemption. There this Court stated,

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due

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[9] The other decisions relied upon by Petitioners also do not support their contention that *Briggs and Stratton* has been overruled. In fact, the decision in *Garner, et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953) not only distinguished *Briggs and Stratton* but also cited it with *approval.* Similarly, the decision in *Local 20, Teamsters etc. v. Morton,* 377 U.S. 252 (1964) recognized only a very limited exception to the protected-prohibited test set forth in *Garmon* and did not overrule *Briggs and Stratton,* either expressly or by implication.

[10] *San Diego Building Trades Council, et al. v. Garmon, et al.,* 359 U.S. 236 (1959).

> regard for the federal enactment requires that state jurisdiction must yield."
>
> • • •
>
> "... When an activity is *arguably subject to §7 or §8 of the Act*, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 244-245; Emphasis supplied).

But, as the Wisconsin Court correctly found, the conduct here is *not even arguably* protected or prohibited by Federal law. The long line of NLRB and Federal court cases conclusively establishing the unprotected nature of this conduct has already been noted,[11] and not even the Union alleges that such conduct was arguably prohibited. Therefore, there can be no inconsistency with *Garmon.*

Petitioners erroneously contend that the Wisconsin Court's decision conflicts with *Local 20, Teamsters, etc. v. Morton*, 377 U.S. 252 (1964). In *Morton*, the action was brought pursuant to Section 303 of the Labor Management Relations Act (29 U.S.C. §187) which authorized suit by any person injured as a result of specified secondary conduct prohibited by that Section. The Ohio Federal District Court found that the Union had violated Section 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. This Court affirmed such finding of a "clear violation of §303." 377 U.S. at 256.

The Union in *Morton* had, however, engaged in another instance of secondary activity, a *direct* approach

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[11] *See, supra*, p. 5, and Note 4, thereat.

by the Union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was *not* in violation of Section 303 since the Union had approached the neutral employer directly, rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law.

This Court reversed the latter award, even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) *comprehensively* and with *great particularity* 'describes and condemns *specific union conduct* directed to *specific objectives.*'" (377 U.S. at 258; Emphasis supplied).

The Court concluded:

> "If the Ohio law of secondary boycott can be applied to proscribe the *same type of conduct* which Congress *focused upon but did not proscribe* when it enacted §303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, ..." (377 U.S. at 259-260; Emphasis supplied).

The decision in *Morton* is an exception[12] to the basic prohibited-protected test set forth in *Briggs and Stratton* and *Garmon*. However, that exception is an extremely narrow one, applicable only where Congress has "focused upon" the conduct in question without prohibiting it.

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[12] Other limited exceptions, not relevant to this case, have also been recognized. For example, a state may enjoin violence even though it may also be an unfair labor practice. *United Automobile, A. & A.I.W. of America v. Wisconsin Employment Relations Board, et al.*, 351 U.S. 266 (1956); *International Union, etc. (UAW-CIO) v. Russell*, 356 U.S. 634 (1958).

Such is *not* the case here.[13] Unlike the very *comprehensive* statutory treatment of secondary boycotts, Congress has *not* "focused upon" partial or "quickie" strikes.[14] In fact, "policing of such conduct is left wholly to the states." *Briggs and Stratton*, 336 U.S. at 253. In the absence of such "focusing," there is simply no conflict with *Morton*.

Petitioners rely on the decision in *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960) to support their claim of a Congressional determination to deny the states the right to regulate unprotected partial strikes. Yet, *Insurance Agents* had *nothing whatsoever* to do with preemption or state power to regulate. That case simply held that similar disruptive tactics were not prohibited under Section 8 of the NLRA, and that the NLRB was not authorized by statute to function as an arbiter of economic weapons in administering the refusal to bargain provisions (Sections 8(a)(5) and 8(b)(3)) of the Federal Act.

The Wisconsin Circuit Court in this case correctly stated:

> "To conclude from this language [in *Insurance Agents*] that the State is barred by the doctrine of

---

[13] A *Morton*-like situation *would* be presented if Congress had outlawed recurrent and other forms of partial strikes without prohibiting a concerted refusal to work overtime.

[14] Petitioners' assertion of a Congressional determination to bar state regulation of such conduct by the defeat of a proposed amendment to the NLRA in 1947 is unfounded (Petition 14-15). That amendment would have prohibited only sit-down strikes and plant seizures and not the conduct here in question and it is impossible to determine why the provision was deleted. An equally plausible explanation is that state regulation was contemplated and deemed sufficient. In any case, the "focus[ing]" referred to in *Morton* was the *enactment* of legislation comprehensively regulating the specific conduct in question, not merely the introduction of a bill.

> preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. . . ." (Pet. App. A-19).

We respectfully submit that the decision of the Court below was not only consistent with, but compelled by this Court's holdings in *Briggs and Stratton* and *Garmon* and that the decisions in *Morton* and *Insurance Agents* have no application to the facts presented here.

III. THERE IS NO REASON FOR THIS COURT TO OVERRULE ITS DECISION IN *BRIGGS AND STRATTON* AND TO RADICALLY ALTER THE PREEMPTION STANDARDS ESTABLISHED IN *GARMON*.

It is Petitioners, not the Wisconsin Court, whose theories of preemption are inconsistent with the decisions of this Court. In reality, Petitioners would have this Court overrule *Briggs and Stratton* and alter the preemption standards set forth in *Garmon* by a radical expansion of the *Morton* exception. *They would classify some "self-help" weapons as protected, some as prohibited, and the remainder as "permitted."* In *each* case, the states would be *totally ousted* from control of that conduct. Rather than accept this Court's conclusion that "much . . . is left to the States,"[15] Petitioners would leave nothing. In effect, that result would immunize such "permitted" activities from *any* regulation, thereby according them a "protection" not intended either by Congress or by the holdings of either the NLRB or this Court.

---

[15] *Amalgamated Ass'n of Street, etc. Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

We respectfully submit that the Union has shown no necessity[16] whatsoever for such a significant change. Under *Briggs and Stratton* and *Garmon,* the states are allowed to regulate only where the subject of that regulation is not arguably protected or prohibited, and where the conduct has not been comprehensively focused upon by Congress as in *Morton.* Operating within these limits, Wisconsin has developed a procedure whereby unprotected, improper Union-directed conduct can be dealt with by administrative agency (WERC) action against the offending Union rather than by self-defeating disciplinary action against individual employees. We see no reason to eliminate such procedures where there is no interference with Federally protected rights.

In *Lockridge,* this Court stated:

> ". . . While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." (403 U.S. at 302).

We respectfully submit that Petitioners have not even come close to carrying that burden.

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[16] There has been *no evidence* of any disruption or imbalance in labor relations in Wisconsin even though the statute in question has been in effect for 36 years.

CONCLUSION

The decision of the Wisconsin Supreme Court is plainly correct under the principles enunciated by this Court, and there is not presented a new or substantial federal question warranting review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-170

EDDIE THOMPSON, JR., PETITIONER

v.

CITY OF COVINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, Executive Director of the Covington Housing Development Corporation, brought this action on behalf of himself and that Corporation under 42 U.S.C. 1981 and 1983 against the City of Covington, Kentucky, several city officials, and two former employees of the United States Department of Housing and Urban Development (HUD). The complaint alleged that the Corporation had contracted with the City of Covington for the development of a housing complex pursuant to the Demonstration Cities and Metropolitan Development Act of 1966, 80 Stat. 1255, as amended, 42 U.S.C. 3301 *et seq.*; that because petitioner is black, city officials deliberately misrepresented certain facts to HUD in a successful attempt to prevent further funding of the project; and that the resulting publicity damaged his

reputation (Pet. 13-14). The complaint sought damages to the corporation or renewed funding for the project, and personal damages to petitioner (Pet. 19).

On December 18, 1973, the district court dismissed the complaint as to the City of Covington on the ground that a municipality is not a "person" within the meaning of the Civil Rights Act, 42 U.S.C. 1981 *et seq.* (Pet. 9-10). On June 27, 1974, the district court dismissed the complaint against the federal defendants on grounds of sovereign immunity and failure to exhaust administrative remedies (Pet. 12-17). On September 11, 1974, the district court dismissed the complaint as to the remaining individual defendants on the ground that petitioner lacked authority to sue on behalf of the corporation (Pet. 18-25).

The court of appeals affirmed (Pet. 27-28) in an opinion on which we rely (*id.* at 28):

> The district court correctly held that the individual plaintiff Thompson was not authorized to initiate or prosecute this action on behalf of his corporate employer. The record discloses no direction to sue or consent by the board of directors of HDC to this suit on behalf of the corporation by Thompson.
>
> In the complaint Thompson also sought relief for violation of his civil rights. He may not recover personally for wrongs allegedly suffered by the corporation which he directed. He and the corporation are separate beings in the eyes of the law. We have carefully searched the record for evidence that the civil rights of the plaintiff Thompson have been infringed by any of the defendants-appellees and have found none. The district court had no jurisdiction over claims of slander by the defendants or injury to Thompson's reputation. It could only consider in-

fringement of rights protected by the United States Constitution or the Civil Rights Act under which this action was brought, 42 U.S.C. §§1981 and 1983. Our review of the record leads to the conclusion that no showing of such infringement was made, and that the defendants were entitled to judgment in their favor as a matter of law. Under these circumstances summary judgment was properly granted.

In addition, we note that the claim against the federal respondents (the two HUD employees) for renewed funding of the housing project is without merit in any event.[1] Those employees had no ability or authority to provide funding to the Covington Housing Development Corporation. See *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603. If the action is therefore treated as one against the United States (*Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682), the relief sought would require affirmative government action or would deplete public funds. But since the complaint did not allege that the HUD employees had acted unconstitutionally or exceeded their authority, the suit is therefore barred by sovereign immunity. *Larson* v. *Domestic and Foreign Commerce Corp., supra; Land* v. *Dollar*, 330 U.S. 731.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[1]The two HUD employees, Hobart Wooten and Roger Carlton, were HUD's area representatives in the Louisville, Kentucky area. Wooten is now deceased (Pet. 14).

[2]Moreover, petitioner did not allege that he attempted to comply with "administrative remedies validly established by regulation * * *" (*National Lawyers Guild* v. *Brownell*, 225 F.2d 552, 557 (C.A.D.C.), certiorari denied, 351 U.S. 927; see 24 C.F.R. Parts 1 and 2), or that exhaustion of such remedies would have been futile. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

FILED
OCT 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-170

EDDIE THOMPSON, JR., ET AL.,
PETITIONERS,

vs.

CITY OF COVINGTON, ET AL.,
RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

EDDIE THOMPSON, JR., Pro Se

736 Highland Avenue
Covington, Kentucky 41011
1-606-491-6278

I hereby certify that 3 copies of the foregoing petition have been served by the United States mail, upon:

Mr. Donald C. Wintersheimer, 306 Covington-Kenton County Municipal Building, Third and Court Streets, Covington, Kentucky

Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530

this ..... day of October, 1975.

.....
Eddie Thompson, Jr., Pro Se

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Miscellaneous:

A corporation, especially a membership corporation, may be deemed a "citizen" for various purposes. *Oneida County Forest Preserve Council* v. *Wehle,* 128 NE 2d 282.

Petitioner, Covington Housing Development Corporation is a corporation, and therefore, it is said, it cannot claim

for itself the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true . . . . But it has business and property for which it claims protection. The Corporation is threatened with destruction through the unwarranted compulsion which respondents have exercised . . . and this Court has gone very far to protect against loss threatened by such action . . . Petitioners ask protection against arbitrary, unreasonable, and unlawful interference . . . . *Pierce* v. *Society of Sisters of Holy Names,* 268 US 1070; *Terrace* v. *Thompson,* 263 US 197.

Federal Rules of Civil Procedure, Rule 56

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-170

EDDIE THOMPSON, JR., ET AL.,
PETITIONERS,

vs.

CITY OF COVINGTON, ET AL.,
RESPONDENTS.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners present their petition for a rehearing of this Court's order dated October 6, 1975, denying the petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully show:

GROUNDS FOR REHEARING

The Court of Appeals did not review the record to see that all matter presented in the pleadings was tried and decided with due process (Pet. for Rehearing en banc, Court of Appeals).

None of the prejudice errors made by the Court below were corrected in the Court of Appeals. An appeal to the Court of Appeals is a right. Plaintiffs appealed the order dismissing the City of Covington (Brief, pgs. 1, 13, 14).

The reason Plaintiffs appealed is that they had no opportunity to be heard on the Motion to Dismiss.

There are many unanswered questions: Was the Housing Development project terminated? Was it terminated illegally? Was the staff paid? Was the project terminated because a black director was hired? Did plaintiffs receive due process of law?

In *Kennedy* v. *Silas Mason Co.*, 334 US 249, this Court stated Summary Judgment procedures "present a treacherous record for deciding issues of far flung import." (Pet. for Rehearing En Banc, Court of Appeals)

Mr. Wagner admitted to the Court of Appeals in his sworn affidavit that Thompson was counsel in the district court. The record indicates that Mr. Clifford Fennell was the attorney in this case. However, Mr. Condit and Mr. Wagner had prevented Mr. Fennell from performing his duty. The reason for Mr. Wagner's statement of who was counsel in the district court was to prevent the Court from letting Thompson argue for the Corporation.

This action was commenced in the District Court by the Covington Housing Development Corporation and Eddie Thompson, Jr., jointly and severally, against the City of Covington, Grimm, Bowman, Wermeling, Sageser, Simpson, Royster, Condit, Hedrick, Wolfe, Woods, and HUD Representatives Carlton and Wooten, to redress wrongs suffered by the Corporation and Thompson as a result of the illegal withholding of funds and the subsequent illegal phasing out of said project. (Original Complaint)

Thompson was injured by this illegal action. The illegal withholding of income he had already earned and the denying of employment because the City Manager was opposed to a black as executive director of the Corporation were indeed injuries. (Original Complaint)

> "Under due process of the Fourteenth Amendment the question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the contemplation of the liberty or property" of the Fourteenth Amendment. *Morrissey* v. *Brewer,* 408 US 471.

One injured by the wrongful act of another to which he in no respect contributed is entitled to compensation from the wrongdoer. *Little* v. *Hackett,* 116 US 366.

On the Motion to Dismiss, the District Court dismissed action as to the City of Covington citing *Monroe* v. *Pape,* 365 US 167:

> "that a municipality is not a 'person' within the purview of the Civil Rights Act . . . . the Court held that 42 USC 1983 . . . . was intended to provide private parties a cause of action for abuse of official authority which resulted in the deprivation of Constitutional rights, privileges, and immunities."

Had Thompson not stated a cause at that time, he should have been dismissed. According to the record, he was not dismissed at that time; and we must assume that Thompson was a proper party to this litigation.

> If matters outside of the pleadings were presented and not excluded by the Federal District Court at hearing on a motion to dismiss the complaint, in part for its failure to state a claim on which relief can be granted, the Court is required by Rule 12 (b) of the Federal Rules of Civil Procedure to treat the motion as one for Summary Judgment and to dispose of it as provided for in Rule 56 of Federal Rules of Civil Procedure. *Carter* v. *Stanton,* 405 US 669.

Neither Thompson nor the Corporation had notice of or hearing on the Motion to Dismiss the City of Covington.

Attorney did not answer the motion (Pet. 10), nor was he present at any hearing on said motion. The record does not indicate that there was a hearing. Plaintiffs were denied due process.

> Due process implies notice and a hearing. *Orchard* v. *Alexander,* 157 US 372.

The complaint states that defendants had funds illegally withheld from Housing Development Corporation because the City Manager was opposed to a black (Thompson) having the position of executive director; that Mr. Royster, Mr. Woods, and Mrs. Hedrick conspired with Mr. Carlton to withhold these funds illegally; that the City Manager ordered the Housing Development Corporation Board of Directors to discharge the staff, but refused to release funds to pay the staff; that the C.D.A. failed to negotiate with the Corporation according to HUD Guidelines due to racial discrimination.

The right to participate in this Model Cities project is clearly set out in *North City Area-Wide Council* v. *Romney,* 469 F2d 1326 (1972). The federal assistance in the program must be in prompt response to local initiative.

The United States Attorney moved to dismiss Carlton and Wooten. Again, plaintiffs had no notice or hearing; nor was their attorney present.

The United States Attorney filed the affidavit of Mr. Virgil Kinnaird, Area Office Director, and in that affidavit Mr. Kinnaird admitted that Roger Carlton had taken the action alleged. (Defendants' Brief, Court of Appeals)

The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard rights for which the constitutional protection is invoked. *Anderson National Bank* v. *Luckett,* 321 US 233.

Lack of due process in this instance prejudiced the rights of Thompson as he was an injured party, yet he was arbitrarily singled out as stating only one of the eleven counts in the complaint.

> 42 USC 1983 was designed to redress deprivation of rights, without procedural due process or equal protection by persons acting under color of law. *Monroe* v. *Pape,* 365 US 167, 173-176.

On July 16, 1974, there was to be a hearing on all motions before the Court. There was a motion for Summary Judgment by plaintiffs, Covington Housing Development Corporation and Eddie Thompson, Jr., before the Court. Thompson's rights had been prejudiced earlier in the order dismissing Carlton and Wooten without a hearing or notice. (Original record entry 54). Defendants acknowledged that without question there were many issues of material fact (Original record entry 63) and that Grimm, Wermeling, Bowman, Sageser, and Simpson had not *intentionally* discriminated against Thompson.

> No specific intent to deprive a person of a federal right is necessary to create liability under 42 USC 1983. *Monroe* v. *Pape, supra.*

Local defendants' motion for Summary Judgment (Defendants' Appendix, pg. 70-74) or an order dismissing plaintiff, Covington Housing Development Corporation was before the Court. It was asked that this motion be granted with prejudice or without prejudice. The Judge further prejudiced Thompson's rights by dismissing complaint at cost of plaintiff Thompson.

Thompson picked up plaintiffs' attorney, Mr. Fennell, to insure his presence in Court. Mr. Condit and Mr. Wagner were surprised that Mr. Fennell showed up. They

badgered him in the halls. When court began, they insisted that the complaint be amended to show Thompson's authority to bring this suit in the name of the Corporation.

There were no hearings on the motions before the court that day or any other day.

Plaintiffs filed Memorandum to show authority to bring this suit in the name of corporate party.

The Court granted defendants Summary Judgment. But,

> Determining whether Thompson had authority to sue for Corporate Body, was not a matter that could be determined by Summary Judgment. The facts of the case had to be reviewed. *Elk Valley Coal Co.* v. *Thompson,* 150 S.W. 817.

The District Court's reference to depositions and interrogatives (Pet. 21) of other participants in the operation had no bearing on the motions without due process.

There are no interrogatives of any board members in the record. However, there is an affidavit of a board member in the record (Original Record entry 58) which states that five members of the board gave their consent to file this suit. There is no affidavit of any board member stating that Thompson was not authorized to file this action.

Depositions were taken of Thompson and Blythe. The Court did not determine if Mr. Blythe was a managing agent (Plaintiffs Brief, Court of Appeals, pg. 18-19).

> The question of whether deposition taken of a managing agent of a Corporation is one which binds or can be used against the Corporation does not arise until it is offered in evidence at the trial. *Kolb* v. *A. H. Bull Steamship,* 31 FRD 252.

> A Summary Judgment against a plaintiff will be vacated and the cause remanded, when Federal District Court's order is opaque and unilluminating as to either the relevant facts or law with respect to the

merit of plaintiff's claim. *Carter* v. *Stanton*, 405 US 669.

The District Court inference on a barren record and pursuant to motions to dismiss were improper. *Smith* v. *Apple*, 264 US 274.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

. . . . . .

EDDIE THOMPSON, JR., Pro Se

CERTIFICATE OF COUNSEL

I, Eddie Thompson, Jr., do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

. . . . . .

EDDIE THOMPSON, JR., Pro Se